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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 L&M COMPANIES, INC.,

11 Plaintiff,

12 v.

13 FRESCO PRODUCE, INC. and FRANK  
14 TORRE, an individual,

15 Defendants.

Civil No. 09cv2207 JAH(NLS)

**TEMPORARY RESTRAINING  
ORDER**

16 This matter is before the Court upon plaintiff's *ex parte* motion for a temporary  
17 restraining order<sup>1</sup> pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. A  
18 temporary restraining order may be granted without notice to the adverse party only if:  
19 (1) it clearly appears from specific facts shown by declaration or verified complaint that  
20 immediate and irreparable injury, loss or damage will result before the adverse party can  
21 be heard in opposition, and (2) the applicant's attorney certifies the reasons that notice  
22 should not be required. Fed.R.Civ.P. 65(b).

23 In this case, it clearly appears from the declaration of Carol McLean that plaintiff,  
24 L&M Companies, Inc., is a produce dealer and trust creditor of defendant Fresco Produce,  
25 Inc., under Section 5(c) of the Perishable Agricultural Commodities Act ("PACA"),  
26 7 U.S.C. §499e(c), and has not been paid for produce in the total amount of \$23,878.00

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28 <sup>1</sup> Plaintiff entitled the motion as an "Order to Show Cause Why a Preliminary Injunction Should Not Issue and Temporary Restraining Order." See Doc. # 5.

1 supplied to said defendant as required by PACA. It is also clear from the same declaration  
 2 that said defendant is in severe financial jeopardy and the PACA trust assets are being  
 3 dissipated or threatened with dissipation, Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154  
 4 (11th Cir. 1990), and that said defendant is not or may not be in a position to pay the  
 5 claims of plaintiff, Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc., 222 F.3d 132,  
 6 141 (3d Cir. 2000), thereby warranting the relief requested by plaintiff. On the basis of  
 7 the pleadings, declaration and other submissions plaintiff has filed in this matter, it  
 8 appears plaintiff will suffer immediate and irreparable injury due to defendant's dissipation  
 9 of plaintiff's beneficial interest in the statutory trust created pursuant to 7 U.S.C. §499e(c)  
 10 and that such dissipation will continue in the absence of injunctive relief. Therefore, the  
 11 Court is of the opinion that a temporary restraining order should be issued.

12 If notice is given to defendant of the pendency of this motion, trust assets will be  
 13 further threatened with dissipation before the motion is heard. As noted in the legislative  
 14 history of PACA, once dissipation has occurred, recovery of trust assets is all but  
 15 impossible. H.R. Rep. No. 543, 98th Cong., 2d Sess. 4 (1983), reprinted in 1984 U.S.  
 16 Code & Admin. News 405, 411; J.R. Brooks & Son, Inc. v. Norman's Country Market,  
 17 Inc., 98 B.R. 47 (Bkrcty. N.D.Fla. 1989). Entry of this Order without notice assures  
 18 retention of the trust assets under the control of this Court, which is specifically vested  
 19 with jurisdiction over the trust. 7 U.S.C. §499e(c)(5). In accordance with Rule 65(b)(2),  
 20 plaintiff's attorney has certified why notice should not be required.

21 Based on the foregoing, this Court finds that plaintiff will suffer immediate  
 22 irreparable injury in the form of a loss of trust assets unless this Order is granted without  
 23 notice.

24 Therefore, **IT IS HEREBY ORDERED** that:

- 25 1. Plaintiff's motion for a temporary restraining order [doc. # 5] is **GRANTED**.
- 26 2. Defendant Fresno Produce, Inc., its agents, officers, subsidiaries, assigns,  
 27 banking and financial institutions, and all persons in active concert or participation with  
 28 said Defendant, including Hana Gibo and Sabah Youkhanna, are enjoined and restrained

1 from dissipating, paying, transferring, assigning or selling any and all assets covered by or  
2 subject to the trust provisions of the PACA without agreement of Plaintiff, or until further  
3 order of this Court.

4 3. Under §499e(c)(2) of PACA, the assets subject to this Order include all of  
5 the assets of Fresno Produce, Inc., unless Fresno Produce, Inc. can prove to this Court that  
6 a particular asset is not derived from perishable agricultural commodities, inventories of  
7 food or other products derived from perishable agricultural commodities or receivables or  
8 proceeds from the sale of such commodities or products. Provided, however, Fresno  
9 Produce, Inc. may sell perishable agricultural commodities or products derived from  
10 perishable agricultural commodities for fair compensation, without right of set-off, on the  
11 condition that Fresno Produce, Inc. maintains the proceeds of such sale subject to this  
12 Order.

13 4. This Order shall be binding upon the parties to this action and all other  
14 persons or entities who receive actual notice of this Order by personal service or otherwise.

15 5. The \$23,878.00 in PACA trust assets belonging to plaintiff and in the  
16 possession of Fresno Produce, Inc. will serve as plaintiff's security for this injunction as  
17 required by Rule 65(c) of the Federal Rules of Civil Procedure.

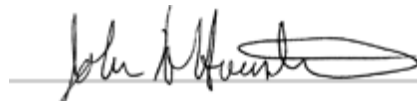
18 6. This temporary restraining order is entered on October 15, 2009.

19 7. A hearing on plaintiff's motion for preliminary injunction is set before this  
20 Court for **October 26, 2009 at 11:00 a.m.**

21 8. Plaintiff shall serve a copy of this Order by personal service on or before  
22 **October 16, 2009**. Such service shall be deemed good and sufficient.

23 9. Defendant shall file any and all responsive pleadings to plaintiff's motion for  
24 preliminary injunction on or before **October 21, 2009**.

25 DATED: October 15, 2009

26   
27 JOHN A. HOUSTON  
28 United States District Judge